No. 17-532

IN THE
# Supreme Court of the United States

CLAYVIN B. HERRERA,

*Petitioner,*

*v.*

STATE OF WYOMING,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY

## BRIEF FOR THE EASTERN SHOSHONE TRIBE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* the Eastern Shoshone Tribe ("Tribe") is a federally recognized tribe, residing in the Wind River Reservation in Wyoming. 83 Fed. Reg. 4235, 4236 (Jan. 30, 2018). For the last 150 years, the Tribe has exercised treaty rights in accordance with the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), which contains language nearly identical to the language in the Treaty of May 7, 1868 between the United States and the Crow Tribe, 15 Stat. 649 ("Crow Treaty"). By virtue of the similarity of their treaties, the Tribe has an interest in ensuring that the Crow Treaty is properly interpreted and that off-reservation hunting rights are not impliedly abrogated.

## SUMMARY OF ARGUMENT

The Wyoming District Court erred in finding that the Crow Tribe's off-reservation hunting rights—guaranteed under the Treaty of May 7, 1868—were extinguished upon Wyoming's statehood or, alternatively, by the establishment of the Bighorn National Forest in 1897. Neither event had the force to abrogate the express treaty right to hunt on the unoccupied lands of the United States.

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[1] All parties to this litigation have consented to this *amicus curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief.

In this Court's many cases involving Indian treaty interpretation lies an important guiding principle—that the federal government has a trust responsibility to Indian tribes. That is, the reason treaties are interpreted liberally in favor of Indians is more than just the common-law rule of *contra proferentem*, i.e., "the general maxim that a contract should be construed most strongly against the drafter." *See United States v. Seckinger*, 397 U.S. 203, 210 (1970). Rather, it is the upshot of the federal government's treatment of Indian tribes up to, including, and in the wake of, the treaty era.

When the federal government entered into treaties with the Indian tribes, it was dealing with sovereigns that this Court has characterized as "domestic dependent nations." *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). That is, though tribes were acknowledged as "distinct political societ[ies], separated from others [and] capable of managing [their] own affairs," *see id.* at 16, they were also considered "dependent" insofar as they relied upon the "protection and good faith" of their guardian—the United States, *see Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Of course, this "protection" had a literal component insofar as it involved the actual physical protection of tribal members against potentially violent non-Indian settlers. But it also had a broader, practical, component insofar as it included assurances relating to their general socioeconomic well-being. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1505–08 (1994).

Out of this well-established guardian–ward relationship has developed a commonsense framework for interpreting Indian treaties. Specifically, Indian treaties are to be interpreted "in the sense in which naturally the Indians would understand them." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). And if any treaty terms are ambiguous, those ambiguities are to be resolved in favor of the "wards of the nation," i.e., the tribes. *See Carpenter*, 280 U.S. at 367; *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973). Furthermore, this rationale extends to analysis of whether a subsequent federal law has *extinguished* a treaty right. Of course, it is axiomatic that Congress—having plenary power over Indian affairs—has the authority to unilaterally abrogate treaty rights. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But to do so it must clearly express that intent. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986). After all, "Indian treaty rights are too fundamental to be easily cast aside." *Id.* at 738.

The lower court's decision effectively turns these basic principles of Indian treaty interpretation on their head. Rather than requiring an express abrogation of the Crow Tribe's off-reservation hunting rights, the court simply adopted a since-repudiated methodology that accords undue weight

to a state's admission to the Union—an approach taken from *Ward v. Race Horse*, 163 U.S. 504 (1896), that was overruled by this Court in the *Mille Lacs* case. But aside from the application of a clearly discredited precedent, the lower court erred by effectively disregarding the doctrinal underpinning of the canon of construction favoring tribal interests: the trust relationship between the federal government and Indian tribes.

The trust responsibility of the federal government to Indian tribes is well-established in this Court's case law, having roots in some of the earliest Indian law decisions in the U.S. Reports. At the most fundamental level, this trust relationship means that the United States is to act as a guardian of tribal sovereignty with a duty to safeguard the health and well-being of tribal members. It is a duty that has been reaffirmed in countless statutes, executive orders, and treaties—including the Crow Treaty.

Properly considered, the trust relationship should have mandated an interpretation of the Crow Treaty that conforms to the methodology employed in the *Mille Lacs* case. Under that framework, neither Wyoming's statehood nor the establishment of the Bighorn National Forest are sufficient to abrogate the important off-reservation hunting rights at issue in this case.

## BACKGROUND

The Eastern Shoshone Tribe has existed in this continent since time immemorial. The Tribe has

a rich history of intergovernmental dealings with the United States, going back to the earliest days of the Republic. In fact, were it not for the aid of a young Shoshone woman named Sacajawea in 1805, it is very likely that the famous expedition of Captain Meriwether Lewis and his Second Lieutenant William Clark would never have found safe passage to the Pacific Ocean.

In subsequent years, the "familiar forces" of westward expansion, *cf. DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975), would strain the relationship between the United States and the Tribe, as white settlers began to encroach upon the Tribe's aboriginal lands. Eventually, the two sovereigns entered into the Treaty of Fort Bridger in 1863, which guaranteed the Tribe a reservation encompassing about 44,672,000 acres. 18 Stat. 685, *see United States v. Shoshone Tribe*, 304 U.S. at 113. However, westward expansion accelerated after the Civil War, thus requiring even more land for the white settlers. Accordingly, the Tribe and the United States entered into a Second Treaty of Fort Bridger, 15 Stat. 673 (1868). By this treaty, the Tribe was guaranteed a much smaller reservation, encompassing around three million acres. *See Shoshone*, 304 U.S. at 113.

But the Second Treaty of Fort Bridger, despite ceding the vast majority of the Tribe's previous reservation, also included a number of important substantive rights, including the right of tribal members to hunt off-reservation. As Article 4 provides:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*

15 Stat. 673, art. 4 (1868) (emphasis added).

In later years, the Northern Arapaho Tribe would come to co-occupy the Wind River Reservation, and the reservation boundaries would change somewhat due to various land purchases by the federal government. *See generally Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017). But despite this co-occupation and the alterations to the boundaries of the reservation, the Second Treaty of Fort Bridger—and specifically its off-reservation hunting provisions—has never been abrogated.

## ARGUMENT

### I. THE FEDERAL TRUST RESPONSIBILITY REQUIRES AN EXPRESS SHOWING OF ABROGATION OF TREATY RIGHTS.

#### A. The federal government has a trust responsibility to Indian tribes.

It is a foundational tenet of federal Indian law that the United States owes a trust responsibility to Indian tribes. Pursuant to this trust responsibility, as a general matter, the federal government has an obligation to engage with tribes in good faith and to protect tribal sovereignty and tribal resources. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975). The precise contours of this trust relationship are ever-evolving, but the actual existence of the trust relationship is at this point "undisputed." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

The trust responsibility is rooted in one of the Supreme Court's earliest Indian law decisions, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The question presented in that case was whether the Cherokee Nation could be considered a "foreign nation" so as to allow the Supreme Court to exercise original jurisdiction under Article III. *Id.* at 15–16, 20. In holding that the tribe could not be considered a foreign nation, Chief Justice Marshall described tribes as "domestic dependent nations" and characterized the relationship between the United States and the tribes as that of "a ward to his guardian." *Id.* at 17. In other words, the federal government owed tribes a duty of protection.

This trust relationship would feature prominently in the development of federal Indian law over the next two centuries. In 1832, in the follow-on case to *Cherokee Nation*, the Court would interpret the federal government's trust responsibility as generally ousting state

governments from exercising jurisdiction over tribes, holding that the laws of the State of Georgia "can have no force" in Indian Country. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). By the late 1800s, the trust responsibility had become the primary justification for the federal government's so-called "plenary" power over Indian affairs—despite the fact that the Constitution only explicitly grants Congress authority "to regulate *commerce* with . . . the Indian tribes," without specifically granting any broader general authority. *See United States v. Kagama*, 118 U.S. 375 (1886) ("[S]o largely due to the course of dealing of the federal government with [the tribes], and the treaties in which it has been promised, there arises a duty of protection, and with it the power."). In this way, the Court sanctioned an expansion of Congress's legislative role far beyond the traditional understanding of the doctrine of enumerated powers. *Cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("The Constitution's express conferral of some powers makes clear that it does not grant others."). In more recent years, Congress has utilized this power to involve the federal government—in some shape or form—in nearly every high-level aspect of tribal affairs.

Indeed, over time, the trust responsibility has found support in countless federal statutes and Executive Branch proclamations. *E.g.*, Indian Child Welfare Act, 25 U.S.C. § 1901(3) ("[T]he United States has a direct interest, as trustee, in protecting Indian children . . . ."); Indian Trust Asset Reform Act, 25 U.S.C. § 5601(3) ("[T]hrough treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust

responsibility to protect and support Indian tribes and Indians."); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5387(g) ("The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions."); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(4) ("[T]he Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes . . . ."); *see also Consultation and Coordination with Indian Tribal Governments,* Exec. Order No. 13175, § 2(a) (Nov. 6, 2000) ("Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection."). By now, it is thus a well-entrenched part of federal Indian law.

### B. The trust responsibility demands an interpretation methodology that requires a clear abrogation of treaty rights.

It is against this backdrop of the federal trust responsibility that courts should approach treaty-rights cases. Indeed, as Judge William Canby of the Ninth Circuit has explained, "[t]he trust relationship between the federal government and the Indian tribes ought to weigh heavily against implied abrogation of treaties." American Indian Law 133 (5th ed. 2009).

At the time of the earliest treaties, the guardian–ward dynamic had yet to fully materialize, and given the ongoing Revolutionary War, the Indians were actually negotiating treaties from a position of relative strength. The first treaty between an Indian tribe and the United States—the Treaty of Fort Pitt of 1778, with the Delaware Nation—is illustrative of the circumstances. 7 Stat. 13 (1778). Article III of the treaty expressly acknowledged the Revolution and granted the American troops "free passage" through the Delawares' territory—permission that was strategically critical for the military at the time. *See id.*, art. III. This provision—indicating the American military's need for the tribe's permission to cross its land—plainly reflected the understanding that "[b]oth parties to the treaty clearly assumed that continuing Indian ownership and possession of aboriginal lands included the Indians' right to govern, control, and exclude anyone on their lands, including Washington's army." *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 119 (2002).

At the same time, even in this first treaty—in the midst of the Revolution—the notion of the United States' "duty of protection" was at work. While Article III of the Fort Pitt Treaty clearly contemplated the Delaware Nation's complete territorial sovereignty, language in Article VI simultaneously laid out the United States' duty to protect this sovereignty, providing as follows:

> Whereas the enemies of the United States have endeavored, by every

> artifice of their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it has been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.

7 Stat. 13, art. VI. Hence, well before Chief Justice Marshall wrote that the relation of tribes to the United States "resembles that of a ward to his guardian," *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, the terms of the Fort Pitt Treaty "illuminate[d] the purpose of the duty of protection, that later ripened into the so-called federal trust doctrine." Clinton, *supra*, 34 Ariz. St. L.J. at 124.

Indeed, the treaties themselves set the early groundwork for the trust relationship, as they contained some of the most overt language documenting the federal government's duty or protection. Take for example the Treaty of Hopewell with the Cherokee Nation, entered into on November 28, 1785. Article 3 of the treaty explicitly states that the Cherokees shall be "under the protection of the United States of America." 7 Stat. 18. This treaty proved critical to the *Cherokee Nation* decision, cited by Chief Justice Marshall as evidence of tribes'

status as "domestic dependent nations." *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("They acknowledge themselves in their treaties to be under the protection of the United States . . . ."). Around the same time as the *Cherokee Nation* case, the United States continued to enter into treaties, with those treaties often reaffirming its protective role. The Treaty of Dancing Rabbit Creek with the Choctaw Nation, for example, provided that "[t]he United States are obligated to protect the Choctaws." 7 Stat. 333 (Feb. 21, 1831).

Even apart from language explicitly identifying the guardian–ward dynamic between the federal government and tribes, the general provisions of most Indian treaties clearly indicated a trust relationship. For instance, in the Treaty of Fort Laramie with the Sioux Nation, the United States made a commitment to furnish the Indians with health care, education, and a variety of other essential services. *See* 15 Stat. 635, art. 13 (April 29, 1868) ("The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated.").

Treaties thus form an integral part of the trust relationship between the United States and the tribes. Accordingly, in adjudicating treaty-rights cases, courts should ensure that treaties are interpreted with appropriate deference to the trust responsibility.

Deference to the trust responsibility in treaty interpretation is well-illustrated in the case of

*United States v. Shoshone Tribe of Indians*, 304 U.S. 111, a case involving the Second Treaty of Fort Bridger, discussed *supra*. The issue in the case was whether the treaty conferred upon the Shoshone Tribe the beneficial ownership of the timber and minerals on their reservation, so as to require just compensation upon the federal government's taking of those resources. *See id.* at 116. The Court noted that the treaty itself did not address the issue, but nonetheless acknowledged that the circumstances and practical construction favored a finding that the Tribe did in fact hold the beneficial interest in the natural resources. At the heart of this analysis was consideration of the guardian–ward relationship. The Court explained: "As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe." *Id.* at 117.

The case of *Seminole Nation v. United States*, 316 U.S. 286 (1942), likewise is instructive of the role that the trust responsibility has in treaty interpretation. The case involved a treaty between the United States and the Seminole Nation, entered into in 1856, which required the federal government to establish a trust fund for the Seminole Nation and to pay the interest from the fund to the tribal members per capita as an annuity. *See id.* at 294. However, instead of making the payments directly to the tribal members, the federal government made the payments to the Seminole General Council, even though they were known to be corrupt. The government argued that the payments were "made at the request of the tribal council, the governing

body of a semiautonomous political entity" and that the payments therefore "discharged the treaty obligation because the agreement was one between the United States and the Seminole Nation and not one between the United States and individual members of the tribe." *Id.* at 295. The Court rejected this argument, explaining as follows:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Id.* at 296–97 (footnote citation omitted).

Granted, *Shoshone* and *Seminole* involved issues regarding the *scope* of treaty rights and whether treaty obligations were properly *discharged*, respectively, not the issue of whether treaty rights have been abrogated entirely by a subsequent federal law. But even when the issue is abrogation, federal courts have similarly remained cognizant of the trust responsibility. *See, e.g., United States v. State of Washington*, 157 F.3d 630, 649 (9th Cir. 1998). Indeed, the canon of liberal interpretation

applicable to Indian treaties is "rooted in the unique trust relationship between the United States and the Indians," and cases involving claims that treaty rights have been abrogated fall squarely within that interpretive framework. *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 227, 247 (1985)).

## II. THE RIGHT TO HUNT ON "UNOCCUPIED LANDS" IS NOT EXTINGUISHED BY STATEHOOD OR BY THE CREATION OF A NATIONAL FOREST.

In the case now before the Court, Respondent claims that the Crow Tribe's treaty right to hunt off-reservation has been extinguished by the admission of Wyoming into the Union in 1890, or alternatively, by the establishment of the Bighorn National Forest in 1897. The proper interpretation of the Crow Treaty—with appropriate deference for the federal trust responsibility—forecloses both of Respondent's arguments.

The Crow Tribe's off-reservation hunting rights are enshrined in language that is essentially identical to Article 4 of the Second Treaty of Fort Bridger, described *supra*. It provides:

> The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be

> found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Crow Treaty, 15 Stat. 649, art. 4.

The theory that statehood alone has the force to extinguish a tribe's treaty right to hunt off-reservation was fully discredited when this Court issued the *Mille Lacs* decision, holding that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U.S. at 205. To the extent the Court's prior decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), suggested otherwise, *Race Horse* has thus been overruled. Accordingly, because the Wyoming District Court's conclusion that Wyoming's statehood abrogated the Crow Tribe's hunting rights relied entirely on *Crow Tribe v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995), which in turn relied on *Race Horse*, the analysis was flawed, and should be reversed.

The lower court's alternative theory regarding the Bighorn National Forest, taken from the "alternative" determination in the Tenth Circuit's *Repsis* decision, was likewise misguided. The 1897 proclamation establishing the Bighorn National Forest could not have possibly rendered the land "occupied" for at least two reasons. First, the proclamation expressly states that the land was "reserved from entry or settlement" and that persons were "not to make settlement upon" the land—language that could not reasonably be construed as

stripping the land of its "unoccupied" status. Presidential Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). Second, even if President Cleveland intended to render the land "occupied"—which clearly he did not—he had no authority to do so. The proclamation was issued under the authority of the Forest Reserve Act, 26 Stat. 1095 (1891), which explicitly provided that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands."

These deep flaws in the lower court's reasoning become even more evident when the treaty rights are interpreted within the greater trust relationship that exists between the Crow Tribe and the United States.

The Crow Treaty outlined a clear guardian–ward relationship between the United States and the Crow Tribe. It ensures that tribal members would be protected against violence at the hands of the non-Indian population, providing that if any "bad men" commit a wrong upon members of the Tribe, the United States would "cause the offender to be arrested and punished" pursuant to federal law. 15 Stat. 649, art. 1. Further, in addition to ensuring safety against potentially violent outsiders, the Crow Treaty also required the United States to assist with a variety of general governmental services. For example, the United States had the obligation to assist with the education of tribal children, art. 7, and with the agricultural development of tribal land, art. 9. And, at the heart of this case, the Crow Treaty also imposed upon the federal government

the obligation to allow members of the Crow Tribe "to hunt on the unoccupied lands of the United States." *See* art. 4. As this Court has made clear, in fulfilling treaty obligations—such as the obligations in Article 4 of the Crow Treaty—"the Government is something more than a mere contracting party. . . [I]t has charged itself with moral obligations of the highest responsibility and trust." *Seminole*, 316 U.S. at 296–97.

It is against this standard that the Court should approach the issue of whether the Crow Tribe's treaty-guaranteed off-reservation hunting rights have been extinguished. Properly taking into account the guardian–ward relationship, it is clear that removing the off-reservation hunting right either through the Wyoming Statehood Act or the Presidential Proclamation would have constituted a grave violation of the United States' trust obligations. Straightforward application of long-established treaty-interpretation principles does not call for such an outcome, and this Court should not allow it.

## CONCLUSION

The judgment of the District Court of Wyoming should be reversed.

Respectfully Submitted,

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